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The Multiple Roles of Judges and Attorneys in Modern Civil Litigation

By ASTRID STADLER*

I. Developments in European Civil Procedure

Civil procedure law in Europe is undergoing a number of changes. Many European countries have changed and modernized their civil procedure law, some in parts and some in whole; they have also felt the multiple influences of European Council Regulations and Directives upon international civil procedure law. Recent changes include the English Civil Procedure Rules (1999), the new Spanish Civil Procedure Rules (2001)¹ and the reform of the German Civil Procedure Rules (ZPO or Zivilprozessordnung), enacted January 1, 2002. In addition, progress has been made with regard to uniform model laws concerning cross-border civil litigation. The American Law Institute, together with the *Institut international pour l'unification du droit privé* (UNIDROIT) in Rome, is working on a worldwide harmonization of "transnational rules of civil procedure."² In all these areas the issues are of great importance and include the court's power of initiative, court management and the general structure of litigation. Yet another important set of issues is when and in which way do parties and non-parties have to disclose evidentiary material, and how can the parties' cooperation be enforced?

The range of the court's power was subject to national reform

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1. L.E.Civ. (2001) (Spain).

2. See generally Geoffrey C. Hazard, Jr., *Preliminary Draft of the ALI Transnational Rules of Civil Procedure*, 33 TEX. INT'L L. J. 489 (1998); Rolf Stürner, *Modellregeln für den internationalen Zivilprozeß?*, 112 ZEITSCHRIFT FÜR ZIVILPROZESS [Z.Z.P.] 185 (1999) [hereinafter Stürner, *Modellregeln für Zivilprozeß*]; Rolf Stürner, *Transnational Civil Procedure: Discovery and Sanctions Against Non-Compliance*, REVUE DE DROIT UNIFORME [R. D. UNIFORME] 871 (2001).

discussions in Great Britain, Spain and Germany. Two different developments have emerged. The new Spanish civil procedure slightly reduced the active role of the judge,³ whereas the new German civil procedure rules moderately strengthened the role of the judge. The new English civil procedure moved away from the adversary system in a significant way, and nearly changed its paradigm completely. Courts in England will now take much greater charge of the conduct of litigation. The English courts can control the activities of the parties much more than before, and will have to deal with the facts presented and the legal arguments of the parties at a much earlier stage of the litigation.⁴ The reform is intended to make the whole procedure more effective and to reduce the taking of evidence to the directly relevant facts. Therefore, the English civil procedure is moving significantly towards the continental system. But even with these English reforms, one can still say that judges in German civil litigation are traditionally the most active among European judges.

II. The Roles of Judges and Attorneys and Their Backgrounds

The part that judges and attorneys play in litigation is not just a question of setting civil procedure law. In order to correctly understand their roles, one has to consider legal cultural diversities and specialities. In contrast to the U.S. adversary system, the great influence of the judge on the conduct of litigation in continental Europe, especially in Germany, is based upon a different understanding of the relationship between the state and its citizens. However, it is inaccurate and lacks differentiation to point out, as some do, that the adversary system is the only democratic system, or that the role of the continental civil judge favors public authority.⁵

3. See Manuel Ortells Ramos, *Der neue spanische Zivilprozeß*, 5 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL [Z.Z.P. INT'L] 95, 100 (2000) (explaining that according to the new Spanish civil procedure law, a corresponding legal opinion of the parties is in some cases even binding on the judge).

4. See generally Michael Stürner, "What so exhausts finances, patience, courage, hope..." *Zur Reform des englischen Zivilprozeßrechts*, 99 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT [Z. VGL. R. WISS.] 311 (2000); Neil Andrews, *A New Civil Procedure Code in England: Party-Control "Going, Going, Gone"*, 4 Z.Z.P. INT'L 3 (1999); Phillip Sobich, *Die Civil Procedure Rules 1999—Zivilprozeßrecht in England*, JURISTENZEITUNG [J.Z.] 775 (1999).

5. Stürner, *Modellregeln für Zivilprozeß*, *supra* note 2, at 187 (stating that this will only result in a stronger prejudice on each side, and that the other procedural system leads to unfair proceedings).

Based upon historical experience, especially under German law, judges have great constitutionally-based independence. At the same time, civil procedure law, in contrast to the Anglo-American tradition, sets out a judge's rights much more clearly and reduces his discretion and ability to freely act in a trial.

Also, the position of German lawyers is totally different from the position of American attorneys. German lawyers are not only representatives of their clients, but according to Bundesrechtsanwaltsordnung § 1 (BRAO, Federal Attorney Act) they are part of the judiciary. This means that German lawyers also have to respect the abstract interests of justice. Because of this concept, German attorneys are publicly seen as a part of the court system.⁶ This explains why professional regulation of the German advocacy under the BRAO is so strict compared to other nations and why, for example, contingent fees are still illegal.⁷ One of the main functions of German lawyers is to relieve the courts of proceedings through preventive legal counselling and extrajudicial representation. However the German advocacy, aside from a number of excellent law firms, is increasingly unable to fulfill this gatekeeping function. This is due to a flood of law school graduates who have poor grades and for whom self-employment is the only chance for survival in the job market.

The presentation of facts and evidence by the parties, according to old and new civil procedure law, is still the backbone of German civil litigation. Nevertheless, the discussion about the court's power of initiative and its influence in favor of the weaker party has been a traditional topic in German civil procedure law. In the 1970s, some representatives of the so-called "social civil procedure" suggested replacing the principle of party presentation with the so-called "principle of cooperation." According to that doctrine, the judge was supposed to intervene in the process of finding the truth for reasons of justice and providing equality of chances to the parties. Many old arguments were revisited in recent debates about the reform of civil procedure law. The argument in favor of imposing a legal obligation on the court to help financially and socially weak parties, both of

6. Hilmar Fenge, *Unabhängigkeit und Verantwortung von Richtern und Rechtsanwälten*, in ANWALTSBERUF UND RICHTERBERUF IN DER HEUTIGEN GESELLSCHAFT: DEUTSCHE LANDESBERICHTEN ZUR IX. WELTKONFERENZ FÜR PROZESSRECHT IN COIMBRA UND LISSABON, 81, 91 (Peter Gilles ed., 1991) [hereinafter ANWALTSBERUF UND RICHTERBERUF].

7. § 49b Abs. 2 BRAO; see also BGHZ 44, 183.

whom are often poorly represented, can only be accepted in part. The incentive for lawyers to prepare and to properly conduct a case will certainly decrease if the responsibility is shifted almost completely to the court, with attorneys being able to count on the court's assistance whenever they make a mistake. For judges, the consequence would be an overwhelming workload that would result in longer trials and a loss of quality.⁸ Court management should therefore not release the attorneys out of their responsibility for their case.

The decision to put more emphasis on either the activity of the judge or the activity of the attorney is closely related to the understanding and the purpose of civil litigation. In the United States and in Great Britain, only a small percentage of disputes (below 10 percent) reach the final hearing of a trial. Dispute resolution through settlements, which are prepared by attorneys on the basis of comprehensive pretrial discovery, is of great importance.⁹ It was one of the goals of the reform of German civil procedure law to strengthen and emphasize court dispute resolution and to increase the profile of court settlements as a possible remedy for those seeking legal protection. One will have to wait for the outcome: the number of court settlements has always varied regionally and depended on the judge handling the case. The German judges, because of their education and self-image,¹⁰ might still focus too much on judgments instead of conciliation.¹¹

Another explanation for this phenomenon is the continental understanding of civil procedure, which differs significantly from the Anglo-American understanding. Continental civil procedure,¹² with

8. Rolf Stürner & Astrid Stadler, *Aktive Rolle des Richters*, in ANWALTSBERUF UND RICHTERBERUF, *supra* note 6, 173, 188.

9. The high settlement rate after pretrial discovery also occurs in the United States and is not only viewed as positive because of the long and costly pretrial discovery.

10. By now mediation, as a new employment opportunity and a special way of negotiation, has become an established course in legal trainings for lawyers; in contrast, mediation is not often taught at universities or in legal training for judges.

11. JAMES GOLDSCHMIDT, *DER PROZESS ALS RECHTSLAGE* 151 (2d ed. 1986) (envisioning an unappealable judgment as the main goal of civil proceedings); ANDREAS SPICKHOFF, *RICHTERLICHE AUFLÄRUNGSPFLICHT UND MATERIELLES RECHT* 17 (1999).

12. For detailed discussions of the original close connection between the Japanese civil procedure and the continental tradition, and the recent opening towards American influences, see Yasunori Honma, *Die Reform des Zivilprozeßrechts in Japan*, 1 Z.Z.P. INT'L 327, 336 (1996); Hiroyuki Matsumoto, *Zur*

its Roman-Canonic origins, is based on rules and claims, and its primary goal is legal protection of the parties.¹³ A slightly less important goal is the objective of litigation and enforcement, namely, that legal rules in general must prove their worth.¹⁴ In contrast, civil procedure in the United States, with its Germanic origin, focuses more on the facts of a case than on legal issues. Disputes are viewed case by case from the factual perspective because of the lack of codified substantive law and the common law development of legal rules. Therefore, clearing up the facts underlying the lawsuit and dispute resolution are more important than legal claims. In order to obtain a broad basis of facts for the American court's decision, civil procedure law in the United States has wide-ranging rules for discovery.

III. The Reform of the German Civil Procedure Rules

A. General Goals of the 2001 Reform of Civil Procedure Rules

The Civil Procedure Rules Act of July 27, 2001, enacted on January 1, 2002, had several different goals. Mainly it was a reform of the German civil procedure remedy system. Another objective was to develop a more consumer-friendly, efficient and transparent¹⁵ civil procedure and to speed up trials, although many believe that civil proceedings in Germany do not take very long compared to other countries. Last but not least, the reform tried to increase the nationwide number of court settlements, which is deemed to be too low.¹⁶ The new civil procedure rules, therefore, require that a "conciliation hearing" has to take place before the actual trial. This will be discussed later.

Looking at the proposals for discussion from the Secretary of Justice, the reform of the remedy system originally was intended to

Struktur des japanischen Zivilprozesses nach der Zivilprozeßordnung von 1996, 2 Z.Z.P. INT'L 333 (1997).

13. See, e.g., LEO ROSENBERG ET AL., *ZIVILPROZESSRECHT*, § 1 III 1 (15th ed. 1993); EBERHARD SCHILKEN, *ZIVILPROZESSRECHT*, Rn. 8; FRIEDRICH STEIN ET AL., *ZIVILPROZESSORDNUNG* Intro. Rn. 4-7 (22d ed. 2003).

14. STEIN ET AL., *supra* note 13, at Intro. Rn. 10. Concerning the misuse of this objective of proceedings during the time of the Nazi regime, see SPICKHOFF, *supra* note 11, at 19.

15. For an explanation of the government draft law regarding the reform of German civil procedure law, see BT-DRS. 14/4722, 58 (Nov. 24, 2000).

16. *Id.* at 62.

reduce the function and competence of the courts of appeals to deciding only points of law. Until then the courts of appeals were more or less courts of second instance deciding upon facts. It was also intended to redesign the court system as a whole and to change the third instance, which was formerly a court for appeals on points of law, into an instance serving the further development of the law and safeguarding unity of jurisdiction. According to this concept, the primary function of the German Federal High Court of Justice (Bundesgerichtshof) is not to decide an individual case, but to give a guideline in deciding legal issues that are controversial among courts of appeals. Due to the new role of the courts of appeals, reformers wanted to strengthen judicial fact-finding in the first instance. This was supposed to be done in two ways: first, courts were supposed to become more active and assist the parties in correctly presenting their case; second, parties and non-parties were obliged to disclose documents and other objects relevant to the subject of the litigation. After long discussions, the original proposal to restrict courts of appeals' jurisdiction to the findings of facts of the first instance was moderated in the now enforced civil procedure rules.

B. Extending the Duties of Parties and Non-Parties

1. Starting Situation: No General Duty to Reveal Evidence in German Civil Procedure

According to the new code, fact-finding is now supposed to be completely done in the court of first instance. Parties should not hold back information or evidence until the litigation is pending before the court of appeals. Although nothing akin to pretrial discovery has been introduced to German civil litigation, both the old and the new German ZPO nevertheless have provisions governing the gathering of information, facts and evidence. There are provisions about the taking of evidence at trial, including: presentation of tangible things, land or other objects for inspection;¹⁷ witnesses;¹⁸ expert witnesses;¹⁹ documents;²⁰ and interrogation of the parties.²¹ Supplementing these rules, you will find provisions about court management in the general

17. §§ 355-372a ZPO.

18. §§ 373-401 ZPO.

19. §§ 402-414 ZPO.

20. §§ 415-444 ZPO.

21. §§ 445-455 ZPO.

part of the ZPO. Sections 141-144 empower the court to order the personal appearance of parties in court, to order the disclosure of documents and files to the court and to order the inspection of objects and the preparation of expertise by court-appointed expert witnesses. Moreover, according to §§ 273 and 358a ZPO, the court may already take these steps in preparation for the trial.

The German ZPO, in comparison to other legal systems, has never imposed a broad obligation on parties or non-parties with regard to the disclosure of documents and other evidence. A general procedural duty of the parties to disclose all evidence in their possession or under their control has always been denied by courts and doctrine. However, at least since the so-called “judicial conflict”²² with the United States in the 1980s, there has been increasing attention paid to Anglo-American civil procedure rules in Germany. Many German and other European enterprises were involved in civil proceedings in the United States, thus experiencing first-hand the “nuisance value” of pretrial discovery as defendants. This almost led to a “discovery-phobia” in the German discussion, and has also influenced the debate about the 2001 reform. Proponents of extending the obligation to disclose evidence have always found it necessary to justify and explain that the introduction of pretrial discovery was not intended. Often it was not understood that the U.S. rules, while imposing a wide range of duties to cooperate and contribute to the finding of facts and evidence, also grant effective protection to the parties, for example, the protection of trade secrets. Many did not realize that continental legal systems like Switzerland and France impose even farther-reaching obligations on the parties to disclose documents than the United States.

22. U.S. courts and parties attempted to obtain evidence in Germany and other European countries by way of pretrial discovery. As most European countries regard the taking of evidence as an act of sovereign power of courts, this U.S. practice was objected to as an infringement on German sovereignty. In addition, European defendants denied their obligation to comply with wide-ranging U.S. discovery orders. See generally *In re Westinghouse Elec. Corp.*, 570 F.2d 899 (10th Cir. 1978); *In re Société Internationale Industrielle Aérospatiale*, 782 F.2d 120 (8th Cir. 1986) *vacated and remanded*, 482 U.S. 522 (1987); *V.W. v. Superior Court*, 176 Cal. Rptr. 874, 883 (1981); Petitioners’ Brief in Response to the Solicitor General’s Brief for the United States at app. 4 (Karl M. Meessen, *The International Law on Taking Evidence from, Not in, a Foreign State: The Anschuetz and Messerschmitt Opinions in the United States Court of Appeals for the Fifth Circuit*), *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority*, 483 U.S. 1002 (1987) (No. 85-98), *reprinted in* 25 I.L.M., 803, 847 (1986); George A. Berman, *Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale Decision*, 63 TUL. L. REV. 525 (1989).

The comparison of U.S. and German civil procedure rules was often incorrect and influenced by a fear of American "fishing expeditions." Fishing expeditions are not permitted under German law, but it is a term that is used in several different procedural situations and should not be used without clear reference to what is actually meant in a specific situation. In 1958 the Bundesgerichtshof tried to explain why fishing expeditions are forbidden under German law with the following axiom: "No party has the obligation to inform the opponent and hand to him the material he needs to win his case, if he is not able to obtain the material on his own."²³

The Bundesgerichtshof explained its rejection of a general duty to disclose evidence with the German principle of party presentation, among other reasons. This means that it is the parties' duty to present facts and means of evidence, in contrast to the principle of court investigation. It is up to the parties to decide which facts and which evidence to present to the court.²⁴ The principle of party presentation also protects the parties from arbitrary actions of the court by drawing a line between court activity and duties of the parties. However, party presentation only means that there is no *ex officio* examination of facts by the court. Party presentation does not require a party in possession of certain evidence to present this evidence upon the request of the opponent having the burden of proof. The principle of party presentation, which already has been modified several times, may be changed again in order to impose a greater obligation to cooperate on the party that does not have the burden of proof. The extent of necessary party activity is primarily a question of where to draw an appropriate line between the protection of privacy and the objective of litigation. A litigation paradigm aimed at the protection of individual rights on the basis of a substantive finding of the truth should ask for greater cooperation from the parties than what is required under the current system. Non-parties traditionally have not had wide-ranging duties to contribute to the fact-finding for a litigation in which they are not involved.

2. *Basic Ideas of the Reform*

The 2001 reform has now adopted the party presentation principle and has considerably extended the duties of parties and non-

23. *BGH*, NEUE JURISTISCHE WOCHENSCHRIFT [N.J.W.] 1491, 1491-92 (1958).

24. ROSENBERG ET AL., *supra* note 13, at § 78 I 3; OTHMAR JAUERNIG, ZIVILPROZESSRECHT: EIN STUDIENBUCH § 25 IV (27th ed. 2002).

parties to disclose documents and other evidence. Now parties and non-parties alike must generally disclose for inspection all documents and objects under their control, and they must permit the inspection of real-estate and the preparation of opinions by expert witnesses. With regard to non-parties, this is a radical break with the past. However, the reformed civil procedure rules allow non-parties to claim the same privileges witnesses already had under the existing rules.²⁵ Moreover, cooperation can be refused if it is “not appropriate or acceptable,” a phrase leaving wide discretion to the courts. With regard to parties, the extension of the procedural obligations is almost always seen as the right step towards a general obligation for party disclosure.

In contrast to the Anglo-American law, the new German ZPO sticks to the principle of not imposing direct compulsory sanctions on parties to enforce discovery. Nevertheless, in case of non-compliance there are sanctions in the form of procedural disadvantages. The court may assume that a party’s alleged facts are true if the opponent refuses to cooperate without good reason or without demonstrating interests worthy of protection. Since the taking of evidence concentrates on facts, which are directly relevant for the judgment, there is a great chance of losing a case if one does not cooperate. If non-parties refuse to cooperate, there are direct means of compulsion which are similar to sanctions for “contempt of court.”²⁶ However, compared to other legal systems, non-parties are still granted extensive privileges by the German ZPO.

3. Taking of Evidence under the Old and New Laws

a. Disclosure of Documents

The ZPO in force until the end of 2001 imposed a duty to disclose documents on parties and non-parties in two situations only. The first occurred when the party who was in control of the documents referred to them in her pleadings or in a court hearing. The second occurred when the party needing the document to prove her case had a right to claim the disclosure based on substantive law.²⁷ To be able to justify these strict regulations, the courts partly accepted (or even “created”) extensive duties to inform and to

25. §§ 142 Abs. 2, 144 Abs. 2 ZPO.

26. §§ 142 Abs. 2 S. 2, 144 Abs. 2 S. 2, 386-390 ZPO.

27. §§ 422-423, 429 ZPO.

disclose documents under substantive law (for example, under the principle of good faith found in § 242 of the German Civil Code, BGB).

Even under the old law there was tension between provisions regulating the taking of evidence upon the application of a party and ex officio court orders. According to former § 142 ZPO the judge preparing a trial was able to order a party to disclose documents to which she previously had referred. Former § 273 Abs. 2 Nr. 1 ZPO even allowed a court to order the general disclosure of documents, without specific requirements. Based upon their wording, these provisions could have been interpreted to extend the scope of the duties to disclose and inform; but the provisions were construed instead in a more restrictive manner. On the one hand, an order to disclose documents according to §§ 142, 273 ZPO could have been issued under any circumstances against the party having the burden of proof. On the other hand, the party not having the burden of proof could have been ordered to disclose documents only under the conditions of §§ 422-423 ZPO. This means there had to be an obligation to hand over the document under substantive law, or the party must have referred to the document on her own, for example by mentioning it in her pleadings. If the opponent refused to disclose the document, the court was able to consider this to the advantage of the party having the burden of proof.²⁸ The court's power to issue a disclosure order on its own initiative, therefore, modified the principle of party presentation but did not actually extend the scope of the duties to disclose documents.

The 2001 reform left §§ 421-423 ZPO unchanged concerning the disclosure of documents of a party upon party application. According to the revised §§ 142, 273 Abs. 2 Nr. 5 ZPO, the court may now order a party or a non-party to disclose documents and files that are under their control if *any* party has referred to the documents in their pleadings or in a court hearing. This means that with regard to non-parties, it is no longer necessary to enforce an obligation to disclose documents under substantive law in a separate, time-consuming trial.²⁹ Any party may file a motion asking the court to give an order for disclosure, according to §§ 142, 428 ZPO and to set a deadline for presenting the documents to the court.

The opponent of the party with the burden of proof now has to

28. §§ 286, 427 ZPO.

29. § 429 ZPO.

disclose any document under his control. The document must still be directly relevant for the judgment and must be described exactly, in a way that the opponent will know which document is being requested for disclosure. Therefore, an *ex officio* court order requires that the parties have offered the necessary information to identify the documents. However, in Germany there is still no legal obligation on the parties to inform the court or the other party about whether they possess documents, or what kind of documents they have in their possession. Duties like these are found in the new English and Japanese civil procedure rules. For example, according to Part 31 of the English Civil Procedure Rules, at the beginning of the litigation each party must make and serve on every other party, a list identifying all the documents on which he relies and the documents which: (i) adversely affect his own case; (ii) adversely affect another party's case; and (iii) support another party's case.

In the first judgments rendered by German courts after the reform, some courts have ordered the disclosure of documents and files that were only generally described. Some commentators criticized these decisions. However, one should not be too critical if the party who needs the document definitely lacks detailed information about it. A more general description should be sufficient as long as it is given in good faith and if the other party is able to identify the requested documents.

The relation between the reformed provisions extending the courts' power of initiative and the provisions concerning the taking of evidence is unclear. In case of a party's application, the opponent still is not generally obliged to disclose the documents under his control, whereas he must do so in case of an *ex officio* court order. The court may ask for the disclosure of documents in preparation of the trial and prior to the formal taking of evidence. The court could do this simply to obtain more information, or to better understand the facts in dispute, but the disclosure may also be necessary to gather evidence and to prepare the taking of evidence at trial.

The differences in the requirements to disclose documents in §§ 142 and 422-423 ZPO will encourage parties and lawyers to push the courts to become active. However, it is within the discretion of the court to decide whether or not to make an order according to § 142 ZPO. Courts are not obliged to act on their own initiative in order to compensate for a party's failure to file a motion to obtain the documents from the other party. With regard to the new rules, in many cases there will be no alternative for the courts but to act on

their own initiative to get documents which one of the parties otherwise would not be obliged to disclose under §§ 422-423 ZPO. It is hard to think of reasons that would justify passivity by the court, particularly where there is no chance for the party that has the burden of proof to present documents as evidence, as is the case when the documents belong to the opponent. As a consequence, the principle of party presentation may eventually lose its standing in favor of court-ordered taking of evidence—a result that probably was not intended by the reform.

In summary, the new rules have given the court more power to manage litigation effectively. There is a better chance now to obtain documents from parties and non-parties within a short period of time. German civil procedure, therefore, comes closer to the international standard. Nevertheless, this is only one step in the right direction. From a systematic point of view it would have been better to impose a general obligation on the parties to disclose evidence, even though it might help an opponent to win his case. This could have been realized within the traditional system of taking evidence upon a party's application. Instead, § 142 ZPO emphasizes the power of the court and moves the initiative to take evidence and control procedure from the parties to the court. This tendency towards greater court activity must not be rejected in principle—to some extent it corresponds to the development of civil procedure law in other European countries. The character of court orders in preparation for the trial will change. Until now court orders ensured procedural efficiency and concentrated on one main hearing.³⁰ From now on, however, court orders concerning the disclosure of documents will not only have the function of obtaining the means of evidence promptly, but will also make documents subject to the court's decision. Without a court order, the party in possession of the documents will be allowed to hold them back even if they are relevant to the subject matter of the litigation.

b. Inspection of Objects and Evidence by Expert Witnesses

i. Legal Situation Prior to the Reform

Prior to the reform, the parties had no duty to permit the inspection of things by the court or by court appointed experts preparing their statement. An exception was made for the physical

30. See HEINZ THOMAS, ZIVILPROZESSORDNUNG § 273 Rn. 1 (24th ed. 2002).

examination of persons in paternity suits to prove parentage.³¹ This kind of cooperation could have also been enforced by contempt sanctions, for example disciplinary fines or imprisonment. One was already able to find duties of parties and non-parties to cooperate in the taking of evidence under substantive law. If a non-party to the litigation refused to comply with such an obligation—disclosure of documents, for example—it had to be enforced in a separate lawsuit.

Despite the fact that there was no general procedural duty to cooperate, the courts did impose an obligation upon the parties to permit the inspection of things and real property by referring to the rules governing documentary evidence. If a party therefore mentioned or referred to objects in her pleadings, the courts assumed that she was obliged to present these objects for inspection, even if their inspection would support the opponent's case. The same was true if the party having the burden of proof under substantive law had a right to see or inspect premises or things that were in the possession of her opponent. If the other party refused inspection without good cause, destroyed objects for inspection or refused to let court appointed experts enter her premises, the court could draw its own conclusions from this behavior. In such a case, for example, the allegations that were to be proved by the examination could have been considered as true and the final judgment might have been based on the allegations without further evidence. Until now, however, non-parties have not had a duty to permit the inspection of objects for any procedural purpose.

Again, the courts had the power to make an order for the inspection of objects or the preparation of a written statement by court appointed experts on their own initiative, without having to wait for a party to apply.³² However, even if there was a court order, the parties were only obligated to cooperate actively and to tolerate certain actions within the limits previously mentioned. With regard to non-parties, parties seeking inspection were only able to hope for their voluntary cooperation.

ii. The New Rules

The taking of evidence by the means of inspection of objects has been changed in two ways. First, just before the extensive reform of the German civil procedure rules, a provision concerning electronic

31. § 372a ZPO.

32. § 144 ZPO.

documents was introduced.³³ It states that, with regard to the taking of evidence, electronic documents are treated like objects for inspection, not like documents. Second, the obligations to disclose objects and permit inspections were extended. Again, the reform does so by giving the court more power to act on its own initiative. According to § 144 ZPO the judge may order a party or a non-party to present objects to the court for inspection. The court may also issue an order to allow an expert witness to inspect things or real property. An exception is made, however, with regard to the residence of a person, which is granted special protection under the German constitution. Irrespective of the restrictions under the former rules, parties now must allow opponents wide-ranging access to inspections. Section 371 ZPO, a rule concerning the taking of evidence, was supplemented as follows: "If a party refuses to tolerate the inspection of an object without good reason and if the inspection therefore is impossible, one can assume the allegations of the opponent concerning the constitution of an object to be proven."

The obligation imposed upon non-parties by § 371 ZPO is completely new. If non-parties cannot claim a privilege, the court order can be enforced by sanctions for contempt of court. Regarding the inspection of things, it does not make any difference whether the court acts on its own initiative³⁴ or if it waits for a party to apply.³⁵ Section 371 ZPO states that the party having the burden of proof is able to formally apply for a court order according to § 144 ZPO.

C. Strengthening Case Managing Powers of the Court

1. Goals of the Reform

According to the principle of party presentation, it is up to the parties to present the facts of a case and the evidence supporting the alleged facts to the court. However, it is a characteristic of German civil proceedings that the court is supposed to support the parties by clear court management in order to accelerate and concentrate proceedings on the directly relevant questions. The court must ask for further information and details if a party's pleadings are too vague. The court is also obligated to help the parties to make correct

33. §§ 292a, 371 I ZPO.

34. § 144 ZPO.

35. § 371 ZPO.

applications in their case.³⁶ It is even deemed acceptable for a judge, if necessary, to draw a party's attention to the fact that her legal arguments are not sufficient, or that she must present either more or better evidence. Therefore, § 139 ZPO sometimes puts the court in a difficult position. On the one hand, insufficient support for one of the parties may cause an error of procedure and may lead to a revocation of the judgment. On the other hand, providing more support than allowed by § 139 ZPO may lead to a challenge of the judge on grounds of favoritism.

On closer examination, § 139 ZPO raises many problems. For example, there is the question of whether court activity should vary depending on whether a party is represented by a lawyer. Another issue is how detailed the court's advice must be if the asserted facts do not justify the legal claim. Finally, it is unclear whether the court must inform the defendant that he might raise objections under substantive law that he did not mention in his pleadings (for example, a statute of limitations defense).

Opinion in the 1970s, an era which saw the judge as a "social engineer" according to the ideas of the Austrian Franz Klein, favored extensive court activity that was supposed to encompass a judicial duty to inform a party about pleas and defenses that the party had not indicated in her presentation. The judge was supposed to level out structurally based disadvantages in the proceedings by taking special care of the socially weaker party. With regard to this concept, it would have been impossible to draw a line between mere court assistance and court investigation. Among other problems, how could a court even decide which was the "weaker" party? Therefore, a bright-line rule with regard to the extent of a court's activity based on § 139 ZPO had not developed. Even though the decisions of the Bundesgerichtshof since the 1980s increasingly favored court assistance, § 139 ZPO has been applied differently from judge to judge.

Therefore, it was a main concern of the recent reform to encourage judges to make better and more uniform use of their power to manage the proceedings and to assist the parties when necessary for procedural efficiency. Without introducing a system of court investigation, the partially exercised "cooperative style"³⁷ of managing civil proceedings was supposed to become a general

36. § 139 ZPO.

37. ROSENBERG ET AL., *supra* note 13, at § 78 I 4.

obligation upon the courts. According to the motives of the reform act, the judge is expected to discuss the facts and legal arguments of a case in detail with the parties. He is also supposed to inform the parties if, and for what reason, his evaluation of the facts and legal arguments differs from the one of the parties.³⁸ The intention was not only to distill the facts and legal arguments to those directly related to the dispute, and therefore speed up civil litigation, but also to render more transparent decisions and to increase their acceptance by the parties.

2. *Section 139 ZPO After the Reform*

The reformed § 139 ZPO stresses the duty of the court to discuss the facts of a case and the legal arguments with the parties. All in all, the reform has put greater emphasis on court management without giving detailed instructions or providing criteria to guide the court. Still, it is solely up to the parties to present new claims and defenses, and the court should not ask the parties to present new facts that have not been indicated before. Court assistance should be seen only as a supplemental aid, to be used in the interest of justice and equality of opportunity. Court assistance should be restricted to helping parties make clearer and more detailed presentations, a result which is not totally different from the parties' initial position. Crossing this line, the rule of neutrality of the court is called into question. It is still the lawyer's responsibility to decide if and how to respond to the advice given by the court. Also the further new regulation in § 139 IV ZPO, which makes it mandatory for judges to give assistance as soon as possible, is already supposed to be court practice.

Moreover, I agree with those who interpret the new rule to mean that a court is not obligated to give extensive advice to a party being represented by a lawyer. Assistance might not be necessary at all if the other party or her lawyer has already pointed out that the presentation is lacking details or that there are other deficiencies.³⁹ A lawyer should be expected to react accordingly. More detailed

38. BT-DRS., *supra* note 15, at 61.

39. In the government authority draft law this was expressly formulated differently. The government draft law, however, is guided by the judgments concerning the old civil procedure law. See HANS-JOACHIM MUSIELAK & ASTRID STADLER, KOMMENTAR ZUR ZIVILPROZESSORDNUNG § 139 Rn. 7 (Hans-Joachim Musielak ed., 2002). For a different opinion, see Egon Schneider, *Tendenzen und Kontroversen in der Rechtsprechung*, MONATSSCHRIFT FÜR DEUTSCHES RECHT [M.D.R.] 747, 752 (2000).

instructions from the court on how to present the case would create an imbalance between the party presentation principle on the one hand, and the court's obligation to give assistance when necessary on the other. The responsibility for presenting a case must lie with the party and her lawyer, not with the court. Therefore, when a party makes general allegations, the court may react with general questions and hints about how to improve the presentation. However, the more detailed and substantiated the presentation, the more concrete and detailed court assistance must be with regard to existing deficiencies.⁴⁰

3. *Documentation of Court Activity*

The most controversial discussions in the reform debate took place with regard to the new duty of the court to document its activity, according to § 139 IV ZPO. While the advocacy naturally welcomed this, the courts feared an enormous additional administrative burden. Some judges fear that they are now required to write down their legal opinion in a kind of draft judgment, which has to be updated in the course of the ongoing proceedings. Until now, courts often only recorded a very short and general note.

The background of the new rule is to increase the possibility of overruling lower court judgments by the courts of appeals or the Bundesgerichtshof. Court assistance must be given according to § 139 ZPO. But if the court fails to give assistance, this might be considered a violation of the right to be heard. The judgment then has to be reversed on appeal.⁴¹ It is supposed to be less difficult under the new rule to later review the scope of court activity. The provision should therefore be seen as positive in its objective. However, lacking concrete and detailed criteria, it does not seem to be very practicable, and makes judges feel insecure with regard to the extent of their duty.

4. *Conciliation Proceedings*

It was another main goal of the reform to improve the culture of conciliation in German civil courts. Any settlement of a dispute by mutual agreement is less expensive and more efficient than lengthy proceedings. The reform, therefore, supports any court effort to reach a settlement. Some years ago the German states (Länder) were given the right to introduce new rules concerning mandatory dispute

40. See also Thomas Doms, *Neue ZPO—Umsetzung in der Anwaltlichen Praxis*, N.J.W. 777, 778 (2002).

41. § 538 II ZPO.

resolution prior to court litigation in small claim disputes.⁴² According to that concept, a claimant could not file a lawsuit without first attempting out-of-court dispute resolution. However, for many reasons this kind of mandatory dispute resolution does not work well in practice.⁴³

The civil procedure rules reform act now introduces a mandatory conciliation hearing in court in order to increase the number of settlements.⁴⁴ If the parties do not attempt out-of-court dispute resolution and if a settlement does not seem to be out of reach, a mandatory conciliation hearing must take place prior to the court's hearing the case. The parties are supposed to appear in person or receive a disciplinary fine for failure to appear without good reason.⁴⁵ If both parties do not appear, the court is obligated to order the suspension of proceedings. Alternative dispute resolution has never had a rich tradition in Germany. The German court system works rather quickly and cost effectively compared to other countries, and people have great confidence in the judiciary. An individual filing a claim normally strives for a judgment. Considering this, one can see that there were good reasons to assume that both the courts and the parties have to be forced into dispute resolution.

The new conciliation hearing regulation replaces the former § 279 ZPO, which stated that the court had to try to settle the dispute at every stage of the proceedings. A model for the new regulation was a provision out of the German Labor Law Proceedings Act.⁴⁶ In labor law proceedings, however, the situations and interests of the parties are completely different than in other civil litigations. The success of court settlement there simply cannot be correlated. The new regulation, therefore, has been viewed sceptically,⁴⁷ especially with regard to the fact that similar regulations were enacted in 1924 and

42. § 15a EGZPO.

43. For a critique of mandatory dispute resolution, see Astrid Stadler, *Außergerichtliche obligatorische Streitschlichtung—Chance oder Illusion?*, N.J.W. 2479 (1998); Gerhard Wagner, *Obligatorische Streitschlichtung im Zivilprozeß: Kosten, Nutzen, Alternativen*, J.Z. 836 (1998), for a more positive estimation, see Hanns Prütting, 62 DEUTSCHER JURISTENTAG [D.J.T.], vol. II at O 11 (1998).

44. §§ 278-279 ZPO.

45. § 278 III ZPO.

46. § 54 ArbGG.

47. See HANNS PRÜTTING, MÜNCHENER KOMMENTAR, AKTUALISIERUNGSBAND ZPO-REFORM UND WEITERE REFORMGESETZE, § 278 Rn. 29 (Gerhard Lücke ed., 2002); Ulrich Foerste, *Die Güteverhandlung im künftigen Zivilprozeß*, N.J.W. 3101, 3103-07 (2001); JAUERNIG, *supra* note 24, at § 28 II 2.

1950, only to be revoked later because of a lack of success and importance.

In most cases a conciliation hearing at the beginning of the litigation occurs too early, and is therefore doomed to failure. A party which files a claim has, in most cases, tried to reach a settlement with the opponent. The willingness to settle the case will, therefore, not increase before the parties have legal discussions with the court and are able to better assess the chances of prevailing at trial.⁴⁸ Sometimes one will even have to wait until evidence has been gathered. Therefore, the old regulation was sufficient, and more flexible. In practice, there will be no big change towards a uniform handling of conciliation hearings among the courts and no increase in the number of settlements. If a judge has previously placed little faith in conciliation discussions, he will now be able to skip the conciliation hearing by pointing out why a settlement is out of reach, or by simply holding a short, technical hearing. It would have been better to stress modern mediation concepts in the German civil procedure rules. If the parties are not forced into conciliation, the chances of reaching a final dispute resolution are far better. The judge, therefore, should be able to suspend the proceedings for voluntary mediation in suitable cases. According to § 278 V 2 ZPO this is already possible, but overall the reform puts far too much emphasis on the role of the judge with regard to dispute resolution. Compared to a mediator, who is not able to render a judgment, the judge is far less able to support productive and open discussion among the parties.

It would be cause for concern if courts felt obliged by the new regulation to increase the total number of settlements by offering settlement routinely, or even by urging the parties to settle the case. Settlements are not the primary goal of civil litigation, and it might be detrimental to the image of the judiciary if parties get the impression that conciliation is not completely based on their own free will. As long as only one of the parties refuses to settle the case, the court is expected to enforce the law. In this regard there will probably always be some difference between continental and U.S. civil litigation.

IV. The Roles of Judges and Attorneys Under the Reformed Civil Procedure Rules

The reform of German civil procedure rules has not only

48. See also JAUERNIG, *supra* note 24, § 28 II 2.

strengthened the position of judges but also the position of attorneys. The reform avoids the problem of the parties and their attorneys waiting passively for court instructions. Because facts and evidence can only be presented to the court of first instance, this forces the representatives of the parties to present their case in full detail at the beginning of the proceedings. Should the conciliation hearing fail, the trial follows right away.⁴⁹ Therefore, parties and their lawyers already have to be well prepared at the outset. The reform did not alter the possibility of striking out the presentation of facts if they are not presented in a timely manner.⁵⁰ At the court of appeals, new facts may be introduced only if the court of first instance has obviously overlooked the facts or has falsely considered them to be of no importance.⁵¹ An error in proceedings has the same consequence. But ordinary negligence of an attorney in presenting the case in complete detail precludes the submission of new facts to the court of appeals.⁵² An attorney should, therefore, present all facts of a case in full detail right from the beginning. He should not wait to present some details later on for tactical reasons, nor should he wait to see how the other party will react. Currently, attorneys feel understandably insecure about how to respond to the new provisions and how to litigate under them.⁵³

However, the reformers also tried to improve court management. The new § 139 ZPO does not provide detailed instructions for the court. Only the changed wording of § 139 ZPO illustrates that more emphasis is supposed to be put on court powers and court activity. The main goal was to remind judges of their duties, especially judges who had refrained from giving adequate court assistance to the parties. The new regulation leaves much room for interpretation, so it is unlikely that courts will apply it uniformly in the future, especially since they have not in the past.

Almost untouched by the reform are the principles of party presentation and court neutrality. Neither principle forces the judge to remain a mere umpire, as has been the tradition in the United States and Great Britain. Therefore, lawmakers are free to strengthen court activities without changing the whole system towards

49. § 279 I Nr. 1 ZPO.

50. § 296 ZPO.

51. § 531 II Nr. 1-2 ZPO.

52. § 531 II Nr. 2-3 ZPO.

53. See Doms, *supra* note 40, at 777.

court investigation. If one compared the reformed and moderately strengthened position of the German judge under the new civil procedure rules with the position of an English judge, the English judge has even broader powers than the German judge. Under the new English Civil Procedure Rules, English courts will take greater charge of the conduct of litigation than has been characteristic in their tradition. According to some comments, control over English civil proceedings has truly moved away from the parties to the court. Judges are expected to prevent parties from taking inappropriate steps and to prosecute the case in an ineffective and costly way. This paradigm shift, of course, is easily recognizable, particularly to those familiar with the especially passive position of English courts in the past. Only time will tell whether the English courts will be able to break with their tradition in practice. It is true for Great Britain as well as Germany that the traditional understanding of the judge's role in civil litigation cannot be fundamentally changed overnight by statutory means.

Moreover, the new German rules further strengthen the position of the court by having a strong tendency towards a single judge. Generally judgments are now initially rendered by a single judge, not by a panel of three.⁵⁴ The judge, therefore, undoubtedly has more responsibility, and also greater power.⁵⁵ This development is viewed critically by the German advocacy. Attorneys are no longer able to hope that they might be able to convince the other two panel judges with their arguments if they are unable to convince the reporting judge who prepared the trial.

Voices in the German advocacy already recommend keeping later remedy proceedings, beyond the court of first instance, in mind. For success in appellate proceedings, it will be important to claim that the constitutional right to be heard and the right to a fair trial have been violated because the court did not give sufficient assistance to the party who lost her case. Therefore, it is technically necessary for the lawyer to find procedural errors made by the court (or maybe even to provoke such errors) in order to be able to present new facts before the court of appeals. This is the only way to leave space for tactical manoeuvring and may be the attorney's only chance to avoid liability if he does make a mistake. In this context, judges and

54. §§ 348, 348a ZPO.

55. Peter Hartmann, *Zivilprozess 2001/2002: Hunderte Wichtiger Änderungen: Ein Überblick für Praktiker*, N.J.W. 2577, 2582 (2001).

attorneys might even have conflicting interests with regard to the documentation of court activity.

To create a new cooperative style between judges and attorneys was a main and legitimate goal of the reform. In the end, the even stricter regulations concerning the presentation of new facts in the appellate instance might not be helpful. It might even further entrench the front lines between judges and attorneys. It is still too early for a final assessment of the reform. In terms of procedural fairness and efficiency, it definitely was a step in the right direction to strengthen the responsibility of judges and attorneys, and to ask for more cooperation of parties and non-parties with regard to the disclosure of evidence. One condition for the reform to be successful will be that the courts will have to exercise their powers according to § 139 ZPO more consciously than they do now. However, harmonizing court assistance and the principle of neutrality in an individual case has become a more difficult task for the judge. The reform cannot claim success if a violation of § 139 ZPO by the court becomes a more central focal point, and if it will determine the strategy of attorneys in the end. One thing is certain: the new § 139 ZPO appears to be the most controversial of the reform provisions. There will be a flood of judgments in the coming years concerning the exact interpretation of this "new" rule with respect to court assistance. Many judgments will also be concerning the conciliation hearing.